

KEOLANUI CAN APPOINT SUBJECT TO APPROVAL.

Judge C. F. Parsons Gives Decision on Two Test Cases—Sets Aside Mandamus Proceedings Against Auditor Maguire—Appointment of Patrolman Knell Invalid Without Board's Approval.

On last Tuesday, Judge Parsons filed with Clerk Gurney, his decision upon mandamus proceedings to compel County Auditor Maguire to issue a warrant to Norman K. Lyman, for services as clerk to the Sheriff. In effect, the decision denies the right of the Board of Supervisors to appoint members of the police force. The decision is as follows:

MANDAMUS DECISION.

Norman K. Lyman, Petitioner,
vs.
Charles Maguire
Auditor of County of Hawaii.

The Board of Supervisors of the County of Hawaii at a regular meeting of that body held in Hilo, Hawaii, on or about the first day of July, 1905, passed a resolution appointing the Petitioner to the position of clerk of the Sheriff of Hawaii. Claiming authority under this resolution Lyman, who prior to that time had been the clerk of Sheriff Searle, remained in the clerk's office during the month of July, keeping regular office hours during that time and transacting certain routine business of the office. Sheriff Keolanui, who went into office about the first day of July, during the entire time of Lyman's alleged employment refused to recognize him as his clerk, but sent to the Board of Supervisors the name of Brickwood Lyman as his choice for the position, which nomination the Board of Supervisors refused to confirm.

On or about the eleventh day of August, 1905, the Petitioner presented to Chas Maguire, as Auditor of the County of Hawaii, a written demand for \$75.00 alleged to be due the Petitioner as his salary for the month of July as clerk to the Sheriff of Hawaii. W. A. Fetter, Deputy Sheriff South Hilo, having certified to the faithful performance of Lyman's services; and the demand, before presentation to the Auditor, having been presented to the clerk, approved by the Board of Supervisors, countersigned by John T. Moir, Chairman of said Board, and attested by Sam K. Pua, Clerk of the County of Hawaii. Upon such presentation the Auditor issued to him a warrant for \$75.00 upon the Treasurer of the County of Hawaii in accordance with his claim. This demand the Auditor refused. Whereupon Petitioner brought mandamus proceedings to compel the issuance of such a warrant by the Auditor.

Petitioner contends that power of appointment of a Clerk to Sheriff of Hawaii is conferred upon the Board of Supervisors by Sub-division 2 of Section 62 of Act 39 of the session Laws of 1905, which provides that such Supervisors shall have power "to appoint such subordinate officers as they may deem necessary for the public service," and claims that under this power he was duly appointed to said position.

Respondent denies the right of the Supervisors to make such appointment and claims that it is his right to refuse to recognize their attempted appointment of Petitioner.

Section 110a of the County Act provides: "Any County Officer may, with the approval of the Board of Supervisors, employ such clerks and other assistants as may be necessary to aid him in the performance of the duties of his office, and may, without such approval, remove the same."

This section clearly confers upon the Sheriff the right to appoint his own clerk subject only to the approval by the Board of Supervisors, and this right is in no way affected by the right of the Supervisors "to appoint such subordinate officers as they may deem ne-

cessary for the public service." The latter clause confers upon the Supervisors power to make appointments only in those instances where the right to make appointments, or election, is not specifically conferred upon others. Section 13 provides for the election of deputy sheriffs. Section 110 provides for the appointment (subject to the approval of the Board of Supervisors) of a deputy to each of the following officers, namely: the Clerk, Auditor, Treasurer and County Attorney. To sustain Petitioner's contention, in effect, would be to hold that the County Act has conferred upon the supervisors the right to nullify the provisions of Section 110 and Section 110a.

Whether or not it is within the power of the Supervisors to appropriate money to pay for special services rendered any county officer without the consent or approval of such officer need not here be considered. In this instance they do not pretend that the appropriation was made for such purpose. An inspection of the vouchers shows that the claim was for salary as Clerk to the Sheriff.

Petitioner claims that so far as the Auditor is concerned the action of the Board of Supervisors in allowing Petitioner's claim is conclusive, and the Auditor is vested with no discretionary powers in the premises; that it is his duty, acting ministerially, to issue a warrant to Petitioner for the payment of such claim without questioning the authority of the Board of Supervisors to order its payment. I cannot adopt this view. In my opinion the Auditor cannot be compelled to issue a warrant upon an illegal claim, even when the same has been approved by the Board of Supervisors.

Subdivision 7 of Chapter 4 of the County Act provides: "All contracts, authorizations, allowances, payments and liabilities entered into, granted, made or incurred in violation of this Act shall be void and shall never be a basis for a claim against the County."

Section 75 of the County Act provides: "The Auditor shall issue warrants on the County Treasurer in favor of persons entitled thereto in payment of claims and demands chargeable against the County which have been legally examined, allowed and ordered paid by the Board of Supervisors."

From this provision the converse is fairly inferable, viz.: that if such claims have not been legally allowed, etc., the Auditor shall not issue warrants for their payment; and I cannot hold that the Legislature intended the Supervisors to be the final judges as between the Auditor and themselves, as to the legality or illegality of their action in making such allowance.

The title "Auditor" implies the right to audit, that is (adopting the language of the Supreme Court of Wyoming in Donzelman vs. Grant, 21 Pac. 693) the right "to hear and upon a hearing to adjust, or to allow, or to reject, or otherwise decide according to the nature of the claims."

"He (the auditor) is charged * * * by the very nature of his office with the duty of auditing or examining accounts, comparing charges with vouchers and thereafter of allowing or rejecting charges and stating balances." Donzelman vs. Grant, supra.

If upon such examination he finds any claim to be illegal it is not only his right but his duty to reject it. "He is in a certain sense a trustee." (Norman vs. Kentucky Board of Managers, 18 L. R. A. 556) and it is his duty to protect the treasury not only against fraud and dishonesty but against

illegality as well. The good faith of the Supervisors is not questioned; but their good faith, in this instance, cannot avail the Petitioner.

Where the Auditor undertakes to reject vouchers which have received the approval of the Board of Supervisors he does so at his peril; but when he pleads as his excuse for such rejection the illegality of the claim, the Court will not refuse to hear him. If the claim is found to be illegal the Court will not assist in its enforcement.

In 1891 the City Council of Seattle passed, over the Mayor's veto, an ordinance providing for the issuance of bonds in excess of the amount of indebtedness which the city was authorized to incur. The mayor refused to sign the bonds. In denying a writ of mandamus against him the Court said:

"While it is true that the regularity of the proceedings of a City Council should not be subject to being questioned in this way, and the due execution of the city's business thus hampered and interrupted, where the power to do the thing attempted is possessed, yet the argument that the mayor should be compelled to sign these bonds regardless of their validity, it seems to us, is without sanction in law or justice. If these instruments would be void if issued, it would be a bad state of affairs indeed if the mayor must be compelled to sign them, and thus put the last finishing touch to their fair appearance, enabling them to be thrown upon the market and find their way into the hands of innocent purchasers, resulting in possible loss and tedious litigation, and thus to the defamation of the fair name and financial standing of the city. Surely the Courts, in the execution of the law, are not so impotent, and compelled to be so blind to justice, as to sanction or enforce the perpetration of such an injustice. If the proceedings had been void, it is manifest for the good of all concerned they should be so stamped at the earliest possible moment, and it is well these steps were taken in advance to determine their value before harm could result to any one." Chalk vs. White, Mayor, 29 Pac. 978.

I find that the Auditor was justified in rejecting the claim of Petitioner. Peremptory writ denied.

Let judgment issue in conformity with this decision.

(Sgd) CHARLES F. PARSONS,
Judge.

Hilo, Hawaii, October 10, 1905.

KNELL IS OUSTED.

On Saturday, Judge Parsons handed down his decision on a second case. This was upon a writ of quo warranto sued out by Chairman John T. Moir, on behalf of the Board of Supervisors, against Harry A. Knell, a mounted patrolman, appointed by Sheriff Keolanui, which questioned his appointment and authority to act as a police officer. The second decision is in line with Judge Parsons' opinion given in the first case. Sheriff Keolanui has the power of appointment, subject however to the approval of the Board of Supervisors. Without such approval, such police officers are acting without authority. The full text of the decision is as follows:

Territory of Hawaii
ex rel. John T. Moir
vs.
Harry A. Knell.

Relator alleges, inter alia, that on or about the 1st day of July, 1905, William M. Keolanui, sheriff of the County of Hawaii, under claim of authority, commissioned and appointed respondent police officer for South Hilo; that the respondent, claiming under said appointment, to be lawfully entitled to hold said office is, and for two months last past has been performing its duties and claiming its emoluments; that Keolanui was without lawful authority to make said appointment, that the said appointment is void; and that respondent is unlawfully occupying and performing the functions of said office.

Respondent, in his answer, admits that he is holding the position of Police officer under the sheriff's appointment but alleges said appointment, under the County Act and particularly under Section 67

thereof, to be valid; and avers that he is lawfully performing the duties of his office.

Section 67 of the County Act, under which respondent claims for the sheriff the right of appointment of police officers provides as follows:

"Subject to the special provisions of this Act, the County Sheriff of each County shall have and exercise all the powers, privileges and authority, and be required to perform all the duties in his jurisdiction, the same being the County in and for which he shall have been elected, as are now by law provided to be had, exercised and performed by the High Sheriff of the Territory or by the Sheriffs of the various Islands respectively; and shall have such other powers and duties as are by this Act conferred and which may be provided by any law hereafter enacted by the Legislative authority; provided, however, that nothing in this Act contained shall be construed to vest in the Sheriffs of the various Counties respectively, the care, custody or control of any Territorial jail, house of correction or penitentiary, or the care and custody of prisoners confined therein."

In order to ascertain the "powers, privileges and authority" provided by law "to be had, exercised and performed by the High Sheriff of the Territory or by the sheriffs of the various Islands respectively" at the time of the enactment of the County Law, reference must be made to Chapter 106 of the Revised Laws of Hawaii.

Section 1556 of that chapter provides:

"HIGH SHERIFF. There shall be a High Sheriff of the Territory, hereafter in this chapter named the High Sheriff. He shall be the Chief of Police for the Territory, and shall be responsible to the Attorney General. He shall have the supervision and control of the Sheriffs and subordinate officers of the police."

Section 1558. "SHERIFFS. There shall be a sheriff for the island of Hawaii, a sheriff for the islands of Maui, Molokai, Lanai and Kahoolawe, and a sheriff for the islands of Kauai and Niihau, who shall have the exercise, the care, supervision and control of the police within their respective jurisdictions, subject, however, to the superior control of the High Sheriff and Attorney General."

Section 1564. "Deputies sheriff, police officers, appointment, removal, pay: The high sheriff for and within the island of Oahu, subject to the approval of the attorney general, and the several sheriffs for and within their respective jurisdictions, subject to the approval of the high sheriff, may appoint such deputies sheriff and other police officers as occasion may require, and may dismiss them in their discretion; and may in like manner apportion the duties, and adjust the compensation of such officers, except as otherwise provided by law; provided, however, that the number of regular police officers shall not exceed, for the island of Oahu, one hundred; for the islands of Maui, Molokai, Lanai and Kahoolawe, eighty; for the island of Hawaii, one hundred; for the islands of Kauai and Niihau, forty; and further provided, that nothing in this section contained shall be construed to prevent the appointment of any number of special police officers to serve without pay, except that for service during any emergency such special officers may be paid, in the discretion of the officer by whom they were appointed to serve during such emergency, if such payment be approved by the attorney general."

Section 1559 provides for the appointment and removal of sheriffs by the High Sheriff with the approval of the Attorney General:

Section 1560 provides that the sheriffs shall give bonds, in the sum therein named, to the Attorney General.

Section 1563 enumerates the duties of the High Sheriff and of the several sheriffs:

Section 1565 authorizes the High Sheriff and the several sheriffs to exact indemnity bonds from their respective deputies.

It now becomes material to enquire how far the foregoing sections of the Revised Laws have become modified by the "special provisions" of the County Act referred to in section 67, above quoted:

Section 13 of the County Act contains a "special provision," for the election of deputy sheriffs, thus depriving the sheriff the power of appointing them.

Sections 20 to 27 inclusive, contain provisions regarding the bonds of County officers, deputy sheriffs included, which differ materially from the chapter 106 of the Revised Laws.

Section 60, as amended by Act 54, contains a special provision "for the removal, under certain circumstances, by the Board of Supervisors of any elected officer of the County (except supervisors.)"

Section 61, as amended by Act

54, gives to the Board of Supervisors power to fill vacancies in office (except in the board) caused by death, resignation or removal.

Section 68 (quoted hereafter at length) recites the duties of the sheriff, differing from the recital contained in section 1562 of the Revised Laws:

Section 110a provides as follows: "Any county officer may, with the approval of the Board of Supervisors, employ such clerks and other assistants as may be necessary to aid him in the performance of the duties of his office, any may, without such approval, remove the same."

Section 112 provides:

"All laws or parts of laws, so far only as the same may be inconsistent with any provision of this Act, are hereby repealed."

Respondent claims that the right of appointment of police officers conferred upon the sheriff of the island, (subject to the approval of the high sheriff) by Section 1564 of the revised laws, now vests in the sheriff of the county by virtue of Section 67 of the county act, and that such right is unaffected by any of the "special provisions" above quoted.

Section 110a, above quoted, empowers the sheriff, subject to the approval of the Board of Supervisors, to "employ such clerks and other assistants as may be necessary to aid him in the performance of the duties of his office."

The "duties of his office" are prescribed by statute.

"Section 68. He shall:

"1. Preserve the public peace;
"2. Arrest and take before the nearest qualified magistrate for examination all persons who attempt to commit, or who have committed a public offense, and shall prosecute the same under the direction of the County Attorney;

"3. Prevent and suppress affrays, breaches of peace, riots and insurrections;
"4. Attend all Circuit Courts held within the County and obey all lawful orders and directions of all courts held within the County;

"5. In an emergency requiring the same, command the aid of as many male inhabitants of the County as he may think necessary in the execution of his duties;

"6. Take charge of and keep the County jail, and the prisoners therein.

"7. Endorse upon all processes and notices the year, month, day, hour and minute of reception, and issue therefor to the person delivering the same on payment of fees, a certificate showing the name of the parties, title and paper and time when received;

"8. Serve all processes and notices in the manner prescribed by law;

"9. Certify, under his hand, upon every process or notice, the manner and time of service, or if he fails to make service, the reason of his failure and return the same without delay."

Manifestly it was not the intention of the legislature that all of these duties, should be performed by the Sheriff personally. It is ap-

parent that one man cannot at once preserve the public peace, make arrests, prosecute offenders in the district courts, prevent and suppress affrays, breaches of peace, riots and insurrections, process and attend all circuit courts within the County. To aid him in the performance of these duties the appointment of "assistants" is necessary and obviously the proper assistants to aid in the performance of such duties, are police officers.

Section 110a, in my opinion, empowers the sheriff to appoint police officers, but under that section the approval of the Board of Supervisors is required to make such appointment valid. The approval of the Board of Supervisors does not appear to have been given to respondent's appointment.

I therefore find that respondent is occupying the position, exercising the functions and claiming the emoluments of a police officer for the District of South Hilo without authority of law.

Let judgment of ouster, with costs, issue against the respondent, in conformity with this decision.

(Signed) C. F. PARSONS,
Judge.

Hilo, Hawaii, Oct. 13, 1905.

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